



Wathiani Investments Limited v Mwangi (Environment & Land Case 18 of 2021) [2024] KEELC 5397 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5397 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 18 OF 2021**

LC KOMINGOI, J

JULY 11, 2024

BETWEEN

WATHIANI INVESTMENTS LIMITED PLAINTIFF

AND

JANE WAIRIMU MWANGI DEFENDANT

JUDGMENT

1. By the Complaint dated 18th June 2007 and Amended on 25th November 2020 the Plaintiff's case is that the suit property Ngong Township/block 1/70 (formerly 305/81) was registered to one George Mathari Muchiri (deceased). Upon his demise, the Kenya Commercial Bank was granted letters of administration on 1st November 1985 as his legal representatives. The bank then later transmitted the suit property among other properties to the Plaintiff, which is a company owned by the Deceased's family/beneficiaries. The said plot was then registered to the Plaintiff on 14th March 1990 and a Certificate of Lease issued in its favour on 31st October 1997.
2. Sometime in the year 2006, the directors of the Plaintiff while visiting the plot discovered that someone had trespassed on the suit plot and put up a permanent building without their knowledge and/or consent. Upon inquiry, they found out that it was the defendant. She has refused to vacate despite several demands to do so.
3. They claimed that this trespass and denial of use of the land had caused them loss of value of Kshs. 43,228,352/= for the period the defendant had been in occupation. Additionally, they pleaded that the Defendant had fraudulently and without their knowledge or consent taken possession of the property and unlawfully dispossessed them ownership.
4. They thus sought for the following orders;
 - a. A declaration that L.R No. Ngong Township/ Block 1/70 belongs to the plaintiff.



- b. An eviction order against the defendant, her agents and all those claiming under her from the suit premises forthwith.
 - c. Compensation for loss of use/value of land for the period of 20 years the defendant has been trespassing and using the suit land total of Kshs. 43,228,352.
 - d. General damages and/or exemplary damages and/or aggravated damages and/or punitive damages against the Defendant for loss of business to be assessed and quantified and proved at the hearing hereof.
 - e. In the alternative the defendant be ordered to pay full compensation of the land at the current market value forthwith and/plus compensation for loss of use/value of land for the period the defendant has been trespassing and using total of Kshs.43,228,352.
 - f. Costs of this suit with interest.
5. The Defendant in her amended statement of defence contested the claim that George Mathari Muchiri was the original owner of the suit property and all allegations of fraud against her stating that the suit property belonged to her late husband Wilson Mwangi Karogo. That in the year 1993, her late husband developed the property with approval from the then Olkejuado County Council. As such, the suit should be dismissed with costs.

Evidence of the Plaintiff

6. PW1, Jacob Ng'ang'a Muchiri, a Director of the Plaintiff adopted his witness statement as part of his evidence in chief and produced his bundle of documents which were marked as P. Exhibits 1-26. He stated that the suit property Ngong Township Block 1/70 was initially 305/81 then later changed to 305/Ngong IR 14037. He stated that once the appointed trustee's (Kenya Commercial Bank) term lapsed, they as a family formed a company (the Plaintiff) and the property was registered in the name of Plaintiff. He stated that in the year 1993 his brother David Kamande (now deceased) was farming on the property but he later travelled abroad. It was not until sometime in 2006 that they discovered someone had entered the suit property and put up a permanent building. Upon inquiry, they found that it was the Defendant. They did not know her or her late husband. He stated that they had incurred losses as a result of the trespass because they could not put the property into use from 1993 when the trespass occurred. According to a valuation report, the land was valued at Kshs. 40,000,000. He also stated that in all those years, he had been paying land rates and had clearance certificates for the same. He prays that the Defendant be compelled to vacate the suit property, pay damages as well as costs of the suit.
7. On cross examination he stated that he was not aware of the process involved in acquiring the said property because his father acquired it when he was young. However, as per the allotment letter, the property was allotted to his father in 1990 and it was fenced in 1993. This was before his late brother, David Kamande left the country. It was in 2006 when they found that someone had developed the property. He stated that he did not know how the Defendant's husband acquired it and how he got approvals to build on it.
8. On re-examination he confirmed that his father's allotment letter was issued on 14th March 1990 by the Commissioner of Lands. When he was shown the Defendant's building approvals, he indicated that they must have been acquired irregularly.
9. PW2 John Njoroge Karori a land valuer produced his valuation report dated 29th September 2019 as P. Exhibit 27. He stated that he visited the property on 24th September 2019 to give an open market



value at the time as well as quantify the loss incurred by the Plaintiff for not having been able to utilise it for over 20 years.

10. On cross examination he indicated that the market value of the undeveloped land was Kshs. 27,000,000 and value of the developed land was Kshs. 43,000,000. He confirmed that the instructions given to him indicated that the Plaintiff had been unable to utilise the land for over 20 years but if they discovered that there was someone on the land in 2006, that period did not amount to 20 years.
11. On re-examination he confirmed that his instructions were to quantify loss incurred for 20 years which is what his report showed.
12. PW3 John Matheka, the Land Registrar Ngong' stated that the parcel known as Ngong Township/Block 1/70 was a leasehold property registered under Olkejuado County council on 17th November 1997 and was leased to Wathiani Investments Limited on 31st October 1997 for a term of 99 years from 1st March 1990. As per their records entry number 1 was registered on 1st October 1997 to Wathiani Investment Limited and entry number 2 shows Certificate of Lease issued in their favour. As per their records, there was also a charge registered against the said land for Kshs. 7,500,000 which he produced as P.Exhibit 27. He also testified that he did not have any records registered in the name Wilson Mwangi Karogo.
13. On cross examination he stated that LR no. 305/81 and Ngong Township/Block 1/70 are distinct properties. He stated that he was not aware that the Defendant's husband had been issued a letter of allotment for the same property and neither was he aware of any transfer between George Muchiri and Wilson Mwangi Karogo. His records only showed Wathiani Investments Limited as the registered owner. On the issue of rates, he indicated that the County Officers were the people who would be in a better position to explain. He also confirmed that for a person to put up a permanent building, approval of the building plans was a requirement.
14. On re-examination he stated that issues of allotment and leases were under the Ministry of Lands. They would then receive the documents for their records. And from their records, the owner of the suit property is the Plaintiff.
15. This marked the close of the Plaintiff's case.

Evidence of the Defendant

16. DW1 Jane Wairimu Mwangi adopted her witness statement as part of her evidence in chief and produced her bundle of documents as exhibits. She stated that her late husband was issued an allotment letter on 7th April 1972. He sought building approvals in 1992 and started developing it in 1993 upon approval of the building plans. She indicated that they have been paying all land rates and had clearance certificates as evidence. As such, she was not a trespasser nor had she acquired the land fraudulently.
17. On cross examination she stated that the house on the suit land was constructed by her late husband and they had been residing thereon, although they did not have a certificate of title for it. She indicated that in all those years, the Plaintiff had never been on the property. She stated that she had been paying rates for the land until 2007. She pointed out that although her husband passed away in August 1998 the receipts were in his name (Wilson Mwangi) because the plot was still in his name. She confirmed that there was a notification of allotment dated 17th August 1994 which her husband accepted. She also restated that her husband received building approvals from Olkejuado County Council and that the building had been leased out to tenants. She stated that she collects Kshs. 200,000 every month from the property as rent.



18. On re-examination she stated that the plot was issued to her late husband in 1972 as per the notification of allotment for plot number 305/81 and he never sold nor transferred the property to anyone. She stated that he applied and was allocated the plot. She confirmed that the plot was still in her late husband's name and that is why the receipts for payment of rates were still being issued in his name.
19. This marked the close of the Defendant's case.
20. At the close of the oral testimonies parties, tendered final written submissions.

The Plaintiff's Submissions

21. On whether the Plaintiff has a good and indefeasible title, counsel submitted that the Plaintiff showed the history of acquisition of the property by the late George Mathari before his demise in 1982. He submitted that before George's demise he was following up on the registration of the plot in his name. The Plaintiff was then incorporated on 15th October 1987 and the allotment letter issued in their favour on 14th March 1990 and it was never allotted to any other person. The land was registered as LR 14037 or 350/81 but was later converted to Ngong/Township/Block 1/70. As such, the Plaintiff was the indefeasible owner as per Sections 24 and 26 of the Land Registration Act and Article 40 of the Constitution of Kenya. Counsel submitted that due process was followed by the late George in acquiring the property citing *Mako Abdi Dolal v Ali Duane & 2 others* [2019] eKLR and that they had proved root title of the plot as held in *Caroline Awinja Ochieng & another v Jane Anne Mbithe Gitau & 2 others* [2015] eKLR.
22. Counsel also submitted that the Defendant had not proved the alleged fraud against the Plaintiff as per the required threshold referring to *Vijay Morjaria v Nasingh Madhusingh Darbar & another* [2000] eKLR. It was also submitted that the Defendant's allegation that the land was allotted to the late Wilson Karogo could not stand because it was not shown how he complied with the conditions set in the allotment letter as was held in *Mbau Saw Mills Ltd v AG for and on behalf of the Commissioner of Land & 2 others* [2014] eKLR.
23. Counsel also submitted that it was evident from the letter dated 17th August 1994 by Wislon Mwangi Karogo to the Clerk Olkejuado County council that the name appearing on the file was not his as per the letter dated 17th April 1972. Counsel also questioned the receipts of payment for the year 2007 which were in the name Willie Mwangi Karogo while by that time, he had already passed on. He also claimed that these receipts were not proof of ownership.
24. On whether the Defendant had trespassed on the suit property, counsel submitted that it was on record and the Defendant had confirmed that she resides on the suit property and collects rent. She was therefore properly sued for trespass and the Plaintiff is entitled to damages of Kshs. 43,228,352 as per the valuation report dated 29th September 2019 tabled in court. The same was never challenged. The Plaintiff also sought costs of the suit. To justify issuance of damages for trespass, counsel cited the following authorities: *Duncan Nderitu Ndegwa v Kenya Pipeline Company Limited & another* [2013] eKLR, *Philip Ayaya Aluchio v Crispinus Ngayo* [2014] eKLR and *Nakuru Industries Ltd v S.S. Mehta & Sons* [2016] eKLR.

The Defendant's submissions

25. On whether the Plaintiff was the legal proprietor of the suit property, counsel submitted that where there were two competing titles to the same property, the first in time should prevail as was held in *Kamau James Njendu v Sarah Wanjiru & another* [2018] eKLR, *Gitwany Investment Ltd v Tajmal Ltd & 3 others* [2006] eKLR and *Wreck Motor Enterprises v Commissioner of Lands & 3 others* [1997]



eKLR. In this case, the Defendant's husband was allotted the suit property in 1972 while the Plaintiff was allotted the same plot in 1990 and the Defendant had shown history of the property as was held in *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR. As such, the Defendant was not a trespasser as she was the legal owner of the suit property and the Plaintiff should not be granted the prayers sought.

26. The suit should thus be dismissed for not having been proved on a balance of probability with costs to the Defendant.

Analysis and Determination

27. I have considered the pleading, the evidence on record, the rival submissions, and the authorities cited. The issues for determination are:

- i. Who is the legal owner of plot L.R No. Ngong Township/ Block 1/70 formerly plot number 305/81;
- ii. Whether the Plaintiff is entitled to the prayers sought.
- iii. Who should bear costs of the suit?

28. The Plaintiff has moved this court seeking a declaration that it is the lawful owner of the property L.R No. Ngong Township/ Block 1/70 and that the Defendant should pay damages for trespass and loss of value of land for the years she has been in occupation.

29. The first issue for determination is whether the Plaintiff is the legal and lawful proprietor of the suit property.

30. It is a well-established principle in case laws that when ownership of land is contested, the claimant must not only prove proprietorship through the legal instrument of title but also provide compelling evidence of the acquisition process. This was the holding in the celebrated case of *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR where the court stated;

“... We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register...”

31. Further, the burden of proof lies with the party who alleges as articulated under Sections 107 and 108 of the *Evidence Act* and the standard of proof in civil matters is on a balance of probability.

32. The Plaintiff claims that the plot was first allotted to their father the late George Mathari Muchiri who passed away in 1982. The Plaintiff produced an allotment letter dated 14th March 1990 for Scheme 305 Ngong LR 14037 formerly 305/81 in favour of George Muchiri thereafter a certificate of Lease in the Plaintiff's name dated 31st October 1997 was issued. PW1 went on to state that they fenced the land and occupied it until the year 1993. The next time they visited the property was in 2006 when they discovered the Defendant had encroached, trespassed and put up a permanent building on it.

33. The other documents produced as exhibits were certificates of official search. From the certificate dated 15th December 2009, it is noted that there is an entry on the even date for a charge to secure a sum of Kshs. 7,500,000. It should be noted that this entry and or charge was registered during pendency of



this suit. The rates clearance certificates produced also run from the year 2007. There is no evidence of payment in the previous years the Plaintiff claims to have owned the land.

34. Looking through the evidence tendered in this court, there is no proof that the plot was owned by the late George Mathari before the year 1990. If it had been allotted to him in the 1980s when he was alive, where are the letters of allotment as evidence. All there is are documents that appear after his demise.
35. There is no proof that the plot was owned by the late George Mathari Muchiri before 1990. If the plot had been allotted to him in the 1980s while he was alive, the letter of allotment from that period should have been presented. However, all the documents appear to have been issued posthumously. Moreover, PW1 confirmed that the last time they were on the said property was in 1990 or 1993. It took them more than 13 years to go back to the property and file the suit. While no objection was raised regarding the timelines, the provisions of Section 7 of the *Limitation of Actions Act* come to my mind. This notwithstanding, the Plaintiff has not demonstrated that it had possession of the said land since it was allegedly allotted to them in the 1980s. All that is on record are documents issued after 2006 during the pendency of this suit.
36. How then is the Court supposed to believe in existence of something that is not adequately proved?
37. The Defendant's case is that the plot was allotted to her late husband Wilson Mwangi Karogo in the year 1972 and he developed it in the year 1993 upon getting approvals from the then Olkejuado County Council. She stated that they have resided peacefully on the suit property since it was allotted to them and there are tenants on the said building who pay rent. To support her claim she produced a letter of notification of allotment of plot number 305/81 from Olkejuado County Council addressed to Willie Mwangi Karogo dated 7th April 1972. On 17th August 1994, the said Wilson Mwangi Karogo wrote to Olkejuado County Council stating that he had developed the plot. And since its allotment, he had been following on the correction of his name so as to obtain his title.
38. From the Defendant's evidence, it is clear that the plot in question was allotted to someone in the year 1972, which precedes the dates given by the Plaintiff. Whether the allotment was to 'Willie' or 'Wilson' it is evident the plot was allotted to a person other than the Plaintiff or George Mathari Muchiri.
39. Even assuming the Plaintiff proved that it held a valid title to the property, it is trite that when there are two parallel claims to the same property, the first in time is held valid. This was the holding in *Gitwany Investment Limited v Tajmal Limited & 2 others*, [2006] eKLR where it was stated; "Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel for land, then if both are apparently and in the fact to them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail..." "the Court of Appeal in *Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others* [2015] eKLR cited with approval the above case.
40. When he was cross-examined by the Defendant's counsel, PW1 told the court that their late father was issued with a letter of Allotment on 14th March 1990. He told the court that he did not know how his late father acquired the suit property as he was young then.

It is on record that the said George Mathari Muchiri passed on in 1982.
41. It is my view that the then County Council of Ol Kejuado who is stated to be the lessor of the suit plot ought to have issued the said George Mathari Muchiri with a letter of allotment as well since the County Council and the Commissioner of Lands both had a role to play in the allocation of the plots.
42. It is also, not clear when the Defendant trespassed onto the suit property. It is the Plaintiff's evidence that when they visited the Plot on 2006, they found the permanent buildings. This confirms the



Defendant's case that her late husband put up the building in 1993. She also stated that her husband was allocated the plot in 7/4/1972.

43. It appears the late George Mathari Muchiri was allocated a plot which had already been allocated to the Defendant's husband Wilson Mwangi Karogo in 1972
44. It is the Defendant's contention that she has been on the suit property for over forty (40) years. This assertion was not rebutted by the Plaintiff.
45. The defunct County Council of Ol Kejuado was issued with a third party notice but neglected to participate in these proceedings.
46. Having stated that the letter of Allotment to Wilson Mwangi Karogo was the first in time, it goes without saying that the defendant as the administrator of his estate is entitled to be registered as the legal owner of the suit property.
47. In the case of Dr. Joseph N.K. Arap Ngok v Justice Moiwo Ole Keiwua & 4 others Civil Application No. 60 of 1991; the Court of Appeal held as follows;

“It has been held severally that a letter of allotment per se is nothing but invitation inhabitant treat. It does not constitute a contract between the offeror and the offeree and does not confer interest in land at all. It cannot thus be used to defeat title of a person who is the registered proprietor of the said parcel of land.”
48. Similarly in Rukaya Ali Mohammed v David Gikonyo Nambachia & Another Kisumu HCCA 9/2004 Warsame J held that;

“.....once a letter of allotment is issued and the allottee meets the conditions therein the land is no longer available for allotment; since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal and was against public interest.”
49. From the foregoing I find that the plaintiff is not entitled to the reliefs sought in the Plaintiff.
50. In conclusion, I find that the Plaintiff has failed to prove its case against the defendant on a balance of probabilities and the suit is dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 11TH DAY OF JULY 2024.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Ms. Nyanguru for Mr. Mulinge for the Plaintiff.

Mr. Kingori for Mrs. Akedi for the Defendant.

Court Assistant – Mutisya.

